BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

COMMENTS OF SBC COMMUNICATIONS INC.

JAMES D. ELLIS
ROBERT M. LYNCH
175 E. Houston, Room 1254
San Antonio, Texas 78205

LORI L. ORTENSTONE
525 B Street, Room 900
San Diego, California 92101

ATTORNEYS FOR SBC
COMMUNICATIONS INC.

DURWARD D. DUPRE
MARY W. MARKS
JONATHAN W. ROYSTON
One Bell Center, Room 3520
St. Louis, Missouri 63101
(314) 235-2507

ATTORNEYS FOR SOUTHWESTERN BELL
TELEPHONE COMPANY

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Summary*

The carrier formula being devised in this proceeding is governed by many of the same principles applicable to the existing cable operator formula. Therefore, the comments by SBC and others on changes to the existing formula proposed earlier this year in the Pole Attachment Notice should be considered in developing the carrier formula in this proceeding, except where the 1996 Act requires differences in the two formulas.

In recognition of the 1996 Act's express preference for privately negotiated pole attachment agreements, the Commission should honor those agreements rather than treat them as automatically voidable at the attacher's option upon filing a complaint.

To formulate the method of calculating pole attachment rates applicable when the parties are unable to reach an agreement, the Commission need not provide more detailed rulings concerning access and safety issues than those already adopted in the Local Competition Proceeding. Rulings on specific conditions of access should be resolved on a case-by-case basis, as the Commission decided in the Local Competition Proceeding. For example, the Commission need not adopt any requirements concerning third party access to, or use of, a previous attachment in order to address the rate-related consequences of allowing such access.

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* The abbreviations used in this Summary are defined in the body of these Comments.

While SBC submits that any more detailed rulings on access to right-of-way facilities should be adopted through an adjudicatory process that considers the particular circumstances of each case, if the Commission decides to address the suggested "extensions" of Heritage, SBC opposes them. Section 224 gives carriers a right of access for purposes of providing telecommunications services, not to sublease excess space to third party overlashers. Among other problems, giving an attacher the right to share its space with other attachers would give attachers an attribute of ownership that Section 224 does not authorize.

The same presumptions regarding average pole height, usable space and space occupied by an attachment should be applied to carrier and cable operator attachments. To allocate non-usable space based on the number of attaching entities, the carrier formula should count all entities that have pole attachments governed by Section 224.

Thus, each cable operator or telecommunications carrier (as defined in Section 224 to exclude ILECs) should be counted as a separate attaching entity for each foot, or part of a foot, it occupies. Given that Section 224(e) assigns at least a one-third share of the non-usable space to the ILEC pole-owner and that ILECs generally are not considered "telecommunications carriers" capable of having "pole attachments" for purposes of Section 224, the ILEC should not be double-counted as a separate attaching entity. Neither should the electric utility be counted as an

attaching entity unless its attachments are used to provide telecommunications services. Likewise, local government agencies, which do not provide telecommunications services, should not be counted as attaching entities, especially considering that the costs associated with local right-of-way regulation should be shared equitably by all benefitting service providers. However, in the event a utility chooses to permit attachers to share space with third party carriers or cable operators that overlash their lines on the attacher's pre-existing attachments, these overlashing entities should be counted as separate attaching entities.

The same principles should be applied to conduit, using the proposed half-duct convention. The half-duct presumption best approximates actual current usage of average conduit space. Suggestions by commenters such as AT&T, MCI and NCTA to use a smaller fraction, such as one-third or one-fourth, should be rejected because they are based on a hypothetical future network constructed in the most efficient manner using state-of-the-art construction methods under ideal conditions. Adopting such a presumption would be a drastic departure from the Commission's long-standing pole attachment practice and would require fundamental changes in what always has been a historical or embedded cost approach.

The Commission should adopt the simplest and most expeditious method for each utility to determine its presumptive state- or company-wide average number of attaching entities based

on information it possesses. Existing utility records or periodic random surveys by the utility could be used. A nationwide or other Commission survey would not work well for this component of the formula. Surveys at the state-wide level are better for a number of reasons, including the fact that multiple surveys of different parts of each state would cause the process to be overly complex.

Given that utilities and attachers have managed without a conduit formula for the last 20 years, they should be able to handle rates for access to bare rights-of-way in the absence of a right-of-way formula. Therefore, right-of-way rates should be addressed on a case-by-case basis as the need arises.

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COMMENTS OF SBC COMMUNICATIONS INC.[1]

In this proceeding, the Commission explores the issues presented by the new telecommunications carrier formula for calculating pole attachment rates required by the Telecommunications Act of 1996 (the "1996 Act") amendments to the Pole Attachment Act appearing in Section 224(e) of the Communications Act.[2] The most significant difference between the existing formula and the carrier formula is Section 224(e)'s requirement that the cost of non-usable space be allocated based upon the number of "attaching entities."[3] This requires a careful examination of issues such as the meaning of "attaching

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[1] SBC Communications Inc. ("SBC") files these Comments on behalf of its subsidiaries, including Southwestern Bell Telephone Company ("SWBT"), Pacific Bell and Nevada Bell, pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM")in the above-captioned proceeding released on August 12, 1997.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 codified at 47 U.S.C. §§151 *et seq.*

[3] 47 U.S.C. §224(e)(2).

entities," whether certain types of entities should be counted, whether overlashing attachments should be counted, and how to establish the average number of attaching entities. For the sake of establishing a complete record in this proceeding, the NPRM also seeks comment on a number of issues which are pertinent to both the existing cable operator formula and the future carrier formula. A number of parties already filed comments on these issues as they relate to the existing formula in response to the Pole Attachment Notice in CS Docket No. 97-98.[4]

Rather than repeat its position concerning these common issues, SBC incorporates by reference its Comments and Reply Comments filed in CS Docket No. 97-98. Accordingly, SBC only addresses these common issues to the extent necessary or where there is a reason for distinguishing the previous comments in the context of the carrier formula.

I. THE COMMISSION SHOULD NOT IGNORE NEGOTIATED AGREEMENTS.

As its only recognition of the 1996 Act's preference for negotiated agreements, the NPRM proposes to continue using the current rule that merely requires that the complaint contain a summary of the dispute resolution efforts undertaken prior to filing the complaint. While the NPRM claims that negotiations are "the primary means by which pole attachment issues are

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[4] Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking, FCC 97-94, released March 14, 1997 ("Pole Attachment Notice").

resolved,"[5] the Commission routinely ignores negotiated agreements whenever a complaint is filed.[6] Therefore, in practice, the Commission only honors negotiated pole attachment agreements if the attacher never files a complaint. As SBC noted in its CS Docket No. 97-98 Reply Comments, the Commission's treatment of pole attachment agreements as automatically voidable at the attacher's option is contrary to Section 224(e)'s express deference to private negotiations. Further, this approach is inconsistent with the 1996's Act overriding "preference for voluntarily negotiated interconnection agreements" noted and discussed in detail in the Eighth Circuit's recent ruling in Iowa Utilities Board.[7]

The Commission's involvement in resolution of disputes concerning pole attachment rates is indeed "limited to circumstances 'when the parties fail to resolve a dispute over such charges'."[8] Whenever the attacher and the utility reach a negotiated agreement that provides for the applicable charges, the statute reflects that this negotiated agreement, and not the Commission's formula, would be applicable. In the face of the express statutory preference for negotiated pole attachment

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[5] NPRM, ¶12.

[6] See, e.g., TCA Management Co. v. Southwestern Public Service Co., CC Docket No. 95-84, 10 FCC Rcd 11832 ¶¶14-15 (1995)

[7] Case Nos. 96-3321 *et seq.*, slip op., §II(B) (8th Cir. July 18,1997).

[8] NPRM, ¶12.

agreements, it is not proper for the Commission to assume unequal bargaining positions, and thereby, make all pole attachment agreements voidable. Instead of promoting negotiated agreements, continuation of the current approach discourages compromise and encourages attachers to challenge negotiated agreements through the pole attachment complaint process.

For these and other reasons, the Commission should adopt the enhancements to the complaint process suggested by SBC, US West and BellSouth in CS Docket No. 97-98.[9]

Under the existing procedures that the Commission proposes to continue, the only negotiated agreements that are not subject to defeasance through the pole attachment complaint process are those that are negotiated as settlements of a complaint. The same deference should routinely be given to agreements negotiated between utilities and attachers outside the complaint process.

II. THE COMMISSION SHOULD NOT ADOPT ANY ADDITIONAL GUIDELINES CONCERNING ATTACHMENT SPACE ACCESS IN THIS PROCEEDING.

The NPRM seeks comment on Commission regulation of

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[9] SBC Comments, CS Docket No. 97-98, at 41-42; SBC Reply Comments, CS Docket No. 97-98 at 30-31; BellSouth Comments, CS Docket No. 97-98, at 4-5; US West Comments, CS Docket No. 97-98, at 8. Among other things, SBC had suggested, as a pre-requisite to filing a complaint, that the complainant certify that it had communicated with the utility concerning each and every disputed issue. SBC also recommended adoption of a "safe harbor" or presumption approach that would minimize the burden of unnecessary complaints by, for example, adopting a presumption that a rate is not excessive where the attacher has been paying the same or a higher rate for a lengthy period such as 12 months.

conditions or limitations associated with an attacher's access to attachment space.[10] As the NPRM subsequently points out in its discussion of conduit, this proceeding is not intended to address access or safety issues, which "are more appropriately addressed in the context of the *Local Competition Provisions Order*."[11] Just as the NPRM suggests that conduit access and safety issues should be addressed in the Local Competition Proceeding, such issues regarding pole attachment space should also be resolved in that context. In contrast, this proceeding should focus on the rate-related consequences of any access determinations. For example, the Commission should not decide in this proceeding whether electric utility conduit space can be shared with telecommunications carriers consistent with "safety, reliability and generally applicable engineering standards." Instead, this proceeding would determine the applicable rate methodology in the event that it is later determined that electric utility conduit space can be shared with a carrier. Certainly, once the access determinations are made, it may be necessary to refine the rate methodology, such as in the event that as a technical matter, a certain separation requirement is required between electric and telecommunications cables in the same conduit.

The Commission should not attempt to establish guidelines of general applicability concerning access requirements and

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[10] NPRM, ¶¶13-15.

[11] NPRM, ¶36 (citing 11 FCC Rcd 15499, ¶¶1119-1248(1996)).

conditions. As the Commission concluded in the Local Competition Proceeding, "the reasonableness of particular conditions of access by a utility should be resolved on a case-specific basis. . . . The record makes clear that there are simply too many variables to permit any other approach . . . ."[12] In fact, in the Local Competition Proceeding, the Commission established an expedited process for resolving any disputes concerning conditions of access.[13] That expedited complaint process is the proper forum for resolving access and safety issues to the extent they have not been resolved by the ground rules and guidelines of general applicability adopted in the Local Competition Proceeding.

Therefore, as a further example, the Commission should not consider in this proceeding whether a utility is required to allow access for non-standard attachments. Instead, as contemplated by the Commission in the Local Competition Proceeding, that should be decided on a case-by-case basis using safety, reliability and generally applicable engineering standards.[14] Such standards also may be applicable to excessive overlashing that may threaten the integrity or safety of the pole.

The Commission did adopt guidelines concerning some specific

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[12] Local Competition Order, ¶1143.

[13] Id. ¶¶1222-1231.

[14] Id. ¶1186.

issues in the Local Competition Proceeding.[15] It also indicated that it would monitor the case-by-case resolution of other access issues and might propose other detailed guidelines in the future.[16] Accordingly, for now, the Commission should defer such access issues to case-by-case resolution, instead of addressing them in this rulemaking concerning rates.

III. THE COMMISSION SHOULD NOT EXPAND THE SOON-TO-BE-OBSOLETE HERITAGE DECISION.

The NPRM seeks comment as to whether it should extend its ruling in Heritage[17] to additional conditions or limitations that utilities may impose in connection with access to attachment space. As pointed out in the previous section, such access issues should be decided in the context of the Local Competition Proceeding on a case-by-case basis. However, to the extent the Commission decides to adopt general, flexible guidelines in this proceeding, SBC offers the comments that follow.

In Heritage, the Commission held that the electric utility could not charge TCI two different rates for attachments by its cable television system, where it charged the regulated rate for facilities used only to provide conventional cable service and a higher rate for attachments used to provide non-video

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[15] Id. ¶¶1119-1216.

[16] Id. ¶1143.

[17] Heritage Cablevision Associates v. Texas Utilities Electric Company, 6 FCC Rcd 7099 (1991) ("Heritage") (subsequent history omitted).

telecommunications services.[18] In effect, the Commission ruled that the utility "lawfully may not charge TCI different pole attachment rates depending on the type of service being provided over the equipment attached to its poles . . . ."[19]

Once the Commission's new carrier pole attachment formula is effective, Heritage will be obsolete. When the carrier formula is effective in the year 2001, utilities will be allowed to charge cable operators two different rates "depending on the type of service provided by the cable operator."[20] If the cable operator is solely providing cable service, then the cable formula under Section 224(d) applies, but, if the cable operator is providing any telecommunications service, then the carrier formula under Section 224(e) will be applicable. Therefore, the real issue is not whether Heritage should be "extended," but, instead, whether a new ruling should take its place under the differential rates allowed by Section 224 as of 2001. SBC submits that any new ruling should be arrived at through a case-by-case adjudicatory process addressing factual situations. It is simply not necessary for the Commission to provide rulings on hypothetical situations that may arise under the new provisions of Section 224 in cases similar to Heritage.

A couple of the potential "extensions" of Heritage that the

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[18] Id.¶¶3, 31-32.

[19] Id.¶32.

[20] NPRM, ¶13.

NPRM specifically asks about involve overlashing a new line to an existing attachment and third party use of dark fiber within an existing attachment. So long as the attacher complies with the applicable safety, reliability and engineering standards for overlashing and has the utility's permission, there should be no problem with an attacher overlashing additional lines on its own previous attachments. However, it is quite a different matter to suggest that "a third party should be permitted to overlash to an existing cable system or telecommunication carriers' attachment."[21] SBC opposes any rule or guideline that would give third party carriers[22] the right to overlash on existing lines without permission from the utility and the original attacher whose lines would be overlashed.

Giving an attacher the right to sublease space to third parties for purposes of overlashing their lines on the attacher's original line, as the NPRM suggests, presents a number of problems. This suggested requirement would give attachers an attribute of ownership that Section 224 does not authorize. Section 224 does require utilities to allow attachers to have

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[21] NPRM, ¶15.

[22] SBC assumes that when the NPRM "inquire[s] whether a third party should be permitted to overlash" it intended to include only third parties that are telecommunications carriers or cable operators that have a separate right of access under Section 224. If the NPRM intended to suggest that attachers would have broader rights than this to provide access to a variety of other potential overlashers, SBC would have other more fundamental objections.

access for purposes of providing telecommunications or cable services, but it does not require access for purposes of subleasing or sublicensing space to third parties. In short, giving attachers a right to sublease or sublicense attachment space "would be tantamount to bestowing an interest that the statute withholds."[23] For example, if the original attacher had the right to sublicense its attachment space, it could rent that space to multiple third parties and recover not only the regulated attachment fee paid to the utility, but also a profit on each attachment. In any event, Section 224 gives attachers a right of access for purposes of their provision of telecommunications or cable service, not to establish themselves as partial owners of or landlords over sections of the pole.

In the Local Competition Proceeding, the Commission refused to adopt a revenue sharing requirement that would have given attachers the equivalent of an ownership interest in the pole. The Commission reasoned that "[t]he statute does not give that [attaching] party any interest in the pole or conduit other than access."[24] Giving attachers a right to sublease or sublicense space certainly would give attachers more than mere access. Such

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[23] Local Competition Order, ¶1216.

[24] Id. See also Bell Atlantic/NYNEX Reply Comments, CS Docket No. 97-98, at 11-13("Nothing in Section 224 confers on a pole attacher any rights of ownership, as AT&T is implicitly suggesting. . . . The Commission should reject AT&T's suggestion that a pole attacher somehow gains an unfettered right to use the space it rents for as many uses and technologies as it chooses, or that it may sublease use of its space to third parties.").

a subleasing or sublicensing right would be inconsistent with the reasoning in the Local Competition Proceeding. Further, it would have grave constitutional "taking" implications that the Commission should strive to minimize. In effect, such a requirement would take the incumbent's property for a purpose not contemplated by Section 224, that is, the purely private purpose of the attacher's sublease or sublicense of pole attachment space.

In a typical commercial lease transaction, the landlord will restrict subleasing of space to third parties.[25] Especially in the case of multi-tenant buildings and retail property, the landlord wants to retain control of the property in order to protect its investment and the revenues it receives from the building. Among other reasons for a landlord's refusal to allow subleasing, it wants to have privity of contract with every occupant of the building in order to be able to hold each occupant directly responsible for complying with all of the covenants, terms and conditions of the office lease. Also, the landlord is able to control its exposure and liability to each occupant if it is able to contract directly with each tenant. Of course, the degree of concern over subleasing varies somewhat based upon the differences in real estate and other laws from

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[25] See Flores, "Drafting Lease Transfer Provisions that Work," 13 The Prac. Real Est. Law. No. 3, March 1997; Black, "Representing Tenants in Office Building Lease Negotiations," 50 Tex. Bar. J. 876, 877 (September 1987).

state-to-state.

The utility has similar concerns regarding subleasing or sublicensing which deserve no less recognition than those of the commercial office space landlord. In fact, these concerns are heightened and have constitutional implications in the case of the utility because it is not voluntarily in the business of providing pole attachment space. Further, it is not able to charge a market rate that would enable it to recover extraordinary costs, such as those resulting from an attacher's accident on the pole, which would not have occurred but for the requirement to provide access. Shared use of an attachment compounds this risk even further.

Regarding the NPRM's second suggested extension of Heritage, SBC submits that the Commission should not address third party use of dark fiber within the original or overlashed fiber-optic lines of an attacher. Third party use of an attacher's dark fiber is quite different from a third party overlashing its cable to an attacher's existing cable. An attacher that allows a third party to overlash is sublicensing or sharing space to be occupied by the facilities owned by the third party; whereas, an attacher that leases out dark fiber is furnishing the use of telecommunications equipment to a third party.[26] Aside from the

[26] Unlike an overlasher, the party using the attacher's dark fiber would not necessarily require access to the pole to install or maintain the fiber. Instead, the lessee of dark fiber can merely attach its electronics at the termination points of the fiber. However, if the lessee of the dark fiber did require

fact that leases and other uses of dark fiber are beyond the scope of Section 224, and thus, not properly within the scope of this proceeding, it would be premature for the Commission to address third party use of a carrier's dark fiber before the Commission resolves the issues on remand from the April 1994 Dark Fiber Decision[27] by the D.C. Circuit Court of Appeals.

For these and other reasons, SBC submits that the Commission should not establish any rules or guidelines regarding third party use of a previous attachment. Instead, as SBC suggested earlier, such issues should be resolved on a case-by-case basis under the guidelines ultimately adopted in the Local Competition Proceedings.

Although the Commission should not adopt any requirements regarding third party use of a previous attachment such as for purposes of overlashing, some utilities may voluntarily allow such third party use through private negotiation of pole attachment agreements. Therefore, the Commission should decide how to treat third party overlashing entities for purposes of allocating the cost of non-usable space under the carrier

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access, this would present an additional burden and risk to the utility similar to that presented by a third party overlasher. Thus, depending on these and other circumstances, including any Commission regulation of dark fiber, it may make sense to treat the lessee of dark fiber as an additional attaching entity.

[27] Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994). See also Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Memorandum Opinion and Order, FCC 97-42, released February 14, 1997, ¶¶ 11-14.

formula.

IV. THE COMMISSION SHOULD USE THE SAME PRESUMPTIONS FOR CARRIER ATTACHMENTS AS FOR CABLE OPERATOR ATTACHMENTS.

Restating issues presented in the Pole Attachment Notice, the NPRM asks several questions about the pole attachment rules' presumptions regarding average pole height, usable space, and space occupied by each attachment. These issues have been debated extensively in CS Docket No. 97-98.[28] Aside from the non-usable space cost allocation, the only new issue presented concerning these presumptions is whether carrier attachments "are sufficiently different or unique"[29] to require the presumptions to be modified. For example, the NPRM asks whether the presumption that a cable operator's attachment occupies one foot of space is applicable to carrier attachments. SBC submits that the Commission should apply the same presumptions to both cable operator and carrier attachments to utility poles, including the presumption that standard attachments occupy one foot of space. If an attacher seeks to attach non-standard equipment that interferes with use of space beyond the one foot, then the parties should be allowed to negotiate an alternative rate. Consistent with Section 224's deference to negotiated agreements,

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[28] For example, in the initial Comments, the following parties addressed the Electric Utilities' proposed changes to the average pole height and usable space presumptions: Bell Atlantic/NYNEX at 10; Consolidated Edison New York at 12-14; GTE at 12-14; MCI at 3-4; Sprint at 5; Time Warner at 9-10; US West at 3-4; USTA at 22-29.

[29] NPRM, ¶19.

the Commission should only intervene to rule on such non-standard attachments if the parties have been unable to reach agreement.

Likewise, the Commission should not unduly complicate the pole attachment rules by entertaining suggestions such as that of Duquesne Light Company("Duquesne"). Duquesne suggests that the rules should "index[] the presumptive space taken on the pole (currently deemed to be one foot) by a factor calculated with respect to weight and windloads."[30] Certainly, any attempt to index the one foot of occupied space based upon weight and other factors would add considerable complexity to the calculation of the maximum rate under the new formula. Instead, the Commission should continue to use the one foot presumption to calculate a rate applicable to each strand physically attached to the pole. Subject to load and other safety and engineering limitations, the attacher should be allowed to place additional lines on its initial strand for a single attachment fee. However, if the attacher wishes to place a second or additional strands or to physically attach at a different location on the pole, then an additional standard attachment fee should apply.

While all the same presumptions should apply to both carrier and cable operator attachments, the Commission should reconsider the allocation of the safety space as SBC and others urged it to

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[30] Petition for Reconsideration and Clarification of Duquesne Light Company, CC Docket No. 96-98, at 18, filed September 30, 1996, cited in NPRM, ¶18.

do in CS Docket No. 97-98[31] as the assumption underlying the safety space allocation have changed considerably, especially for telephone utility poles.

Commenters in CS Docket No. 97-98 that oppose reconsideration of the safety space allocation do so primarily on the basis of electric utility use of the safety space for telecommunications or other profitable purposes.[32] While this factor may properly be considered in deciding what electric utilities may charge for attachment space, it should not apply to telephone utility attachment space, except to the extent that Section 224 becomes applicable to electric/telephone joint use agreements when electric utilities begin providing telecommunications.[33] In any event, under the National Electric Safety Code("NESC") and similar state and local requirements applicable to everyone on the pole, the safety space is not generally supposed to be used and exists to protect the safety of everyone on the pole.[34] Hence, it should be classified as non-

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[31] See, e.g., SBC Comments, CS Docket No. 97-98 at 35-37; SBC Reply Comments, CS Docket No. 97-98, at 12-14; Union Electric Comments, CS Docket No. 97-98, at 24-29.

[32] MCI Reply Comments, CS Docket No. 97-98, at 27-29; NCTA Reply Comments, CS Docket No. 97-98, at 38-40.

[33] SBC Reply Comments, CS Docket No. 97-98, at 13-14.

[34] Institute of Electrical & Electronics Engineers, National Electrical Safety Code §§ 010, 011, 012 & 23 (1997 Edition)("The purpose of these rules is the practical safeguarding of persons during the installation, operation, or maintenance of electrical supply and communications lines and associated equipment." "All electric supply and communication lines and equipment shall be

usable and allocated among the attachers, who are its beneficiaries.

After reconsidering the safety space allocation, the Commission should apply all of the same presumptions to both cable operator and carrier attachments to poles, except for the required difference in the allocation of the cost of non-usable space discussed in more detail below.

V. EACH CABLE OPERATOR OR TELECOMMUNICATIONS CARRIER (OTHER THAN AN ILEC) SHOULD BE COUNTED AS A SEPARATE ATTACHING ENTITY FOR EACH FOOT, OR PART OF A FOOT, IT OCCUPIES.

To implement Section 224(e)(2)'s requirement that the carrier formula apportion two-thirds of the cost of non-usable space equally among all "attaching entities," the NPRM seeks comment on the meaning of "attaching entities" and the method of counting the number of such entities. Specifically, the NPRM proposes "that any telecommunications carrier, or cable operator or LEC attaching to a pole be counted as a separate entity"[35] and to "count[] any telecommunications carrier as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole . . .."[36] Except as discussed below,

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designed, constructed, operated, and maintained to meet the requirements of these rules. . . . The utilities, authorized contractors, or other entities, as applicable, performing design, construction, operation, or maintenance tasks for electric supply or communications lines or equipment covered by this code shall be responsible for meeting applicable requirements.").

[35] NPRM, ¶ 22.

[36] Id., ¶ 23.

SBC supports this approach as the most workable method of implementing Section 224(e).

By counting attaching entities in one-foot increments, the proposed method is consistent with the long-standing method of calculating pole attachment rates based on the presumption that each attachment occupies one foot of space. As discussed above, retention of this one-foot presumption is the most practical approach. By counting an attachment that occupies only a "partial increment of a foot," the proposed method makes it clear that even if the actual space occupied by a small cable is only a few inches, the average space needed to accommodate an attachment is still one foot.

As applied to an entity that is overlashed to another attacher's cable, this proposed method would count each of the two companies as separate attaching entities. That is, each carrier or cable operator would be counted as a separate entity for each foot (or increment thereof) that it occupies, even if that foot is also occupied, in whole or in part, by another attaching entity. While SBC maintains, as discussed above, that utilities should not be required to allow multiple parties to share the same physically attached strand by overlashing, if a utility voluntarily allows it, then it is appropriate to count each attacher as a separate attaching entity in view of the additional responsibilities, risks, liabilities and burdens that multiple parties will impose on the utility. Besides, this method

is consistent with the language of Section 224(e), which requires an equal apportionment among all of the "attaching entities." "Attaching entities," as used in Section 224, appears to refer to the business entity that seeks to attach to a utility's pole for purposes of providing cable service or telecommunications.[37] Therefore, it is appropriate to count each such business entity as a separate attaching entity, even if some of them share a physical attachment by overlashing.[38] Of course, if an attaching entity overlashes a new cable over its own existing cable, those two cables still only count as one attaching entity because there is only one attacher and it is occupying only one foot.

By only proposing to count telecommunications carriers, cable operators and LECs as attaching entities, the Commission does not count electric utility attachments. In fact, the NPRM tentatively concludes that the carrier formula should count an electric utility as an attaching entity once it is providing telecommunications services.[39] SBC concurs with this approach to

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[37] See, e.g., 47 U.S.C. § 224(h)("the owner shall provide written notification of such action to any entity that has obtained an attachment" "Any entity that adds to or modifies its existing attachment"), & (I)("Any entity that obtains an attachment to a pole").

[38] In fact, the Senate Bill and an early version of the House Bill, used the term "attachments" instead of "attaching entities." By using "attaching entities," Section 224(e)(2) recognized that the non-usable space provides an equal benefit to all of the companies attaching to the pole, other than the utility itself, which receives a one-third share before the equal distribution of the remaining two-thirds.

[39] NPRM, ¶22.